DAMAGES—TROVER—ADDED VALUE AND LABOR—In trover the measure of damages is ordinarily the value of the property at the time of conversion, but when the converter has by his labor added in value to the property between the time of taking and the bringing of the action, a majority of courts have adopted a rule of alternative damages, based upon the moral guilt or innocence of the trespasser. If the trespass was wilful, the measure of damages is the increased value; but if it was inadvertent or by mistake, an allowance is made to the trespasser for improvements he has made.[1] This rule of alternative damages is followed in the recent case of *Strickland* v. *Miller*,[2] although neither the theory of the rule nor the amount of compensation to be received by the unintentional converter are there discussed.

The rule has been supported on the ground that the damages are *prima facie*, merely to compensate the plaintiff for his loss, but that when the conversion has been wilful, there is awarded in addition, punitive damages to the extent of the increased value of the goods.[3] This explanation is not entirely satisfactory, because the so-called punitive damages are only awarded in trover when the wilful converter has added value to the property, whereas had he burned or destroyed it, though his moral guilt and the loss to the owner would be equally great, yet no exemplary damages would be recoverable.

A more logical explanation of the two measures of damages is to be found, as is suggested by Lowell, J., in *Trustees of Dartmouth College* v. *Paper Co.*,[4] in the basis of the law of trover. In this form of action the plaintiff may select any moment during which the wrongful dominion continued, consider this as the moment of conversion, and recover full damages for the value of the property at that time. Thus in every case, by this theory, the plaintiff has a *prima facie* right to the increased value, but when the conversion has been in good faith and the converter has expended time and money on the chattel, he acquires a limited right of property in it, of a quasi-contractual nature, on the ground of unjust enrichment, so that the full damages are reduced to the extent of the property rights he has acquired.

On the question of the extent of this right and the consequent reduction of damages the cases are in hopeless conflict. It will readily be seen that the value of the goods after improvement will consist of three elements, viz., the value before taking, the value of the labor of the converter, and an increase in value due to this labor. It is on the allotment of this latter that the courts are

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[1] Woodenware Co. v. United States, 106 U. S. 432 (1882); Texas Ry. Co. v. Jones, 34 Tex. Civ. Ap. 94 (1903); Eaton v. Langley, 65 Ark. 448 (1898); Silsbury v. McCoon, 3 N. Y. 379 (1847); Hilton v. Woods, L. R. 4 Eq. 432 (1867).

[2] 78 S. E. Rep. 48 (Ga., 1913).

[3] Single v. Schneider, 30 Wis. 570 (1872); Pine River Co. v. United States, 186 U. S. 295 (1901).

[4] 132 Fed. Rep. 92 (1904).

divided: some give it to the defendant, by allowing to the plaintiff only the original value as damages;[5] others give it to the plaintiff, by allowing him as damages the value after improvement, less only the value of the defendant's labor.[6] Since either of these rules can only be rough adjustments of conflicting equities, it would seem the more equitable to allow the plaintiff as damages the highest market value of the goods in their original condition between the original taking and the time of bringing the action. This would give him adequate compensation for his loss, but would not take from the defendant the profit arising from the labor innocently and in good faith put upon the property.

If the defendant, instead of being the original trespasser, is a purchaser from him, the case becomes even more complex. If the purchaser knew at the time of purchase of the true ownership, clearly he is in no better position than the wilful trespasser, and should pay as damages the increased value of the property. If he is an innocent purchaser without notice of the true ownership, the overwhelming weight of authority is that he stands in the shoes of his vendor, that the doctrine of *caveat emptor* applies, and the measure of damages payable by him must depend on the good faith of his vendor: if the original trespass was unintentional, the true owner can recover from the purchaser only the original value; if it was intentional, the value at the time of purchase from the trespasser.[7]

There can be little doubt as to the former of the above conclusions; but the latter, that the innocent purchaser from a wilful trespasser should be answerable to a greater amount than the innocent purchaser from an innocent trespasser, appears, on broad principles of justice at least, to be open to serious question. Whether the original trespass be wilful or inadvertent, the injury to the plaintiff, and the technical conversion and moral innocence of the defendant are identical, and it would seem more just that the amount of damages payable by the defendant should depend on his own moral guilt or innocence, rather than on that of his vendor. If the trespasser himself is entitled to a reduction in damages when his trespass was innocent, by analogy it would seem that the purchaser should be allowed the same reduction when his purchase was innocent, irrespective of the good faith of his vendor.

This view of the rights of an innocent purchaser from a wilful trespasser, though not accepted by most courts, is adopted in *Railway* v. *Hutchins*,[8] a case in which trees had been wilfully cut

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[5] United States v. Homestake Co., 117 Fed. Rep. 481 (1902).

[6] Herdic v. Young, 55 Pa. 176 (1867).

[7] Woodenware Co. v. United States, 106 U. S. 432 (1882); Strubble v. Trustees Cincinnati Ry., 78 Ky. 481 (1880); Powers v. Tilley, 87 Me. 34 (1894); Central Coal Co. v. Shoe Co., 69 Ark. 302 (1901); Nesbit v. Lumber Co., 21 Minn. 491 (1875).

[8] 32 Ohio St. 571; 37 Ohio St., 282 (1881).

by trespassers, converted into railroad ties and sold to the defendant without notice of the true ownership. Held by McIlvaine, J., "The plaintiff's loss is no greater than it would have been if the trespasser had been innocent of all intentional wrong; nor is the guilt of the defendant greater. Hence, it seems to a majority of the court, that exact justice would be done, as between these parties, by limiting the plaintiff's damages to the amount of his actual loss, to wit: the value of the trees when they were first taken as personal property."[9] This theory can be supported by an application and extension of the principle laid down in *Trustees Dartmouth College* v. *Paper Co.*[10] The trespasser, whether wilful or unintentional, has by his labor acquired a certain quasi-contractional right in the property taken and improved. Although the wilful trespasser is estopped from asserting this right, because to allow him to do so would require him to prove and enable him to profit by his own wrong, yet the right still exists, and passes with the property to the purchaser. He, if innocent, is not estopped from asserting the right acquired, but by asserting it, becomes entitled to whatever reduction in damages an unintentional trespasser would have been entitled. Thus the *mala fide* trespasser is not allowed to profit by his wrong, and the innocent purchaser is not mulcted in damages to a greater extent than necessary to give ample compensation to the true owner.

T. R., Jr.

LEGAL ETHICS—QUESTIONS AND ANSWERS

QUESTION:

Recently, as a Notary Public, I administered an oath to a party in a matter pending in the United States Land Office. Now that party has been indicted for perjury, alleging that the matters sworn to were false. The party admits the oath, but intends to plead the truth of the statements, and can easily do so. Of course I will be a material witness for the Government, although there will be no dispute over my testimony. He will admit the oath. This party desires that I represent him in his defense on the perjury charge. Can I ethically do so?

ANSWER:

As a general principle, a lawyer should not act as *trial* counsel in a criminal cause in which he knows or has reason to believe that he is to be a material witness *for the prosecution.* The question imports that in the given case the testimony of the inquirer is not in dispute, is against his client, and would be only formal. If the nature of his testimony could be assuredly so limited, the Committee would not disapprove the retainer. Except in a case where such limitations may be confidently predicated, the retainer should, in the opinion of the Committee, be refused.

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[9] 37 Ohio St., 295.
[10] 132 Fed. Rep. 92 (1904).